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No. 88-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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PETITION FOR WRIT OF CERTIORARI

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I. PETITIONER TIMELY RAISED HIS CLAIM IN STATE COURT.

The respondent State of Illinois first argues that certiorari should be denied because Petitioner did not make a timely Griffith v. Kentucky retroactivity claim in state court. This contention is not true.

The instant case was briefed in the Illinois Supreme Court well before this Court's decision in Griffith v. Kentucky. In those briefs, the parties argued the question of the retroactive application of People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) under the "clear break" exception to retroactivity, which was the law prior to Griffith. See Brief and Argument for Plaintiff-Appellee, State of Illinois, p. 25 (filed September 13, 1985)(attached hereto as Appendix A); Reply brief for Defendant-Appellant Donald Lego, p. 5-6 (Filed September 27, 1985)(attached as Appendix B).

After oral argument in the Illinois Supreme Court, while the instant case was under advisement by that court, this Court, on January 13, 1987, decided Griffith v. Kentucky, 479 U.S. __, 93 L.Ed.2d 649 (1987), which abolished the clear break exception to retroactivity for cases pending on direct review. Five weeks after this Court decided Griffith, the Illinois Supreme Court issued its opinion in Petitioner's case. People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800 (1987). The majority held, without mentioning Griffith, that Zehr would not be applied retroactivity since it represented a change in the law. People v. Lego, 507

N.E.2d at 805. In dissent, Justice Simon argued that Griffith required that Zehr be applied retroactivity to Petitioner's case. 507 N.E.2d at 813. Petitioner then filed a Petition for Rehearing in the Illinois Supreme Court which, relying on Griffith, urged that court to reconsider its refusal to apply Zehr retroactively. See Petition for Rehearing for Defendant-Appellant, p. 6-8 (filed April 13, 1987)(attached as Appendix C).

The Petitioner raised his claim under Griffith v. Kentucky in his Petition for Rehearing before the Illinois Supreme Court, which was the first opportunity he had in which to do so. For purposes of seeking a writ of certiorari, Petitioner's Griffith claim was timely made in state court. Beck v. Washington, 369 U.S. 541, 553 (1982); Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U.S. 673, 677-8 (1930).

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION OF THE ILLINOIS SUPREME COURT IN PEOPLE v. ZEHR IS GROUNDED IN FUNDAMENTAL CONSTITUTIONAL GUARANTEES.

The Respondent argues that certiorari review is inappropriate because the underlying substantive issue in People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984), which Petitioner seeks to have applied retroactivity to his case, is based on state law. In Zehr, the Illinois Supreme Court held that it was error for the trial court to refuse to voir dire prospective jurors on 1) whether the jurors understood the presumption of innocence; 2) whether they understood the defendant need not present evidence; and 3) whether they could return a verdict of not guilty if the prosecution failed to prove defendant guilty beyond a reasonable doubt.

It is clear from the language of the Zehr opinion itself that it is not based merely on state law. Rather, it is grounded in the defendant's constitutional guarantee to the presumption of innocence [In Re Winship, 397 U.S. 358 (1970)] and to a fair and impartial jury [Turner v. Louisiana, 379 U.S. 466 (1985); Chapman v. California, 386 U.S. 18 (1967)]. In Zehr, the Illinois

Supreme Court stated:

> We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him. If a juror has a prejudice against any of these basic guarantees, an instruction given at the end of the trial will have little curative effect. It is also vital to the selection of a fair and impartial jury that a juror who finds that the State has failed to sustain its burden of proof of guilt beyond a reasonable doubt have no prejudices against returning a verdict of not guilty. We note parenthetically that it is equally important that a juror who finds that the State has sustained its burden of proof have no prejudice against returning a verdict of guilty. We agree with the appellate court that "[e]ach of these questions goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury" (110 Ill.App.3d 458, 461, 66 Ill.Dec. 155, 442 N.E.2d 581), and although they need not have been asked in precisely the form submitted, the subject matter of the questions should have been covered in the course of interrogation on voir dire. The refusal to ask the questions resulted in prejudicial error which required reversal of the judgment.

469 N.E.2d at 1064 (emphasis added).

Moreover, as subsequent cases make clear, the Illinois Supreme Court has refused to give Zehr retroactive application not because it is based on state law, and therefore not subject to Griffith, but because Griffith had not yet been decided when, in People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986), the court held Zehr to apply prospectively only under the then-prevailing "clear break" exception to retroactivity. For example, in People v. Harris, 123 Ill.2d 113 (1988), the Illinois Supreme Court extensively discussed this interpretation of the applicability of Griffith stating:

> Defendants further argue, in the alternative, that the prospective application rule of our Zehr holding announced in Britz should be reconsidered in light of Griffith v. Kentucky (1987), 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708. We find no merit to the defendants' argument because at the time Britz was decided this court correctly followed the applicable law on retroactivity as articulated by the United States Supreme Court in a series of cases beginning with Linkletter v. Walker (1965), 381 U.S. 618, 14 L.Ed2d 601, 85 S.Ct. 1731. (citations omitted) Prior to Griffith, it was clear

> that "where the Court had expressly declared a rule of criminal procedure to be a 'clear break with the past', Desist v. United States, 394 U.S. at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive." (United State v. Johnson (1982), 457 U.S. 537, 549, 73 L.Ed.2d 202, 213, 102 S.Ct. 2579, 2587.) In the instant case, because Zehr had overturned a longstanding practice to which this court had not spoken, but which a nearly unanimous body of lower court authority had approved. (see People v. Phillip (1st Dist. 1981) 99 Ill.App.3d 362; People v. Lowe, (5th Dist. 1975), 30 Ill.App.3d 49; People v. Stewart, (4th Dist. 1973), 12 Ill.App.3d 226), it represented a "clear break" with the past. (See United States v. Peltier (1975), 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct 2313; Stovall v. Denno (1967), 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967.) Although Griffith subsequently overturned the "clear break" exception, Griffith was not the law on retroactivity at the time this court decided Britz. We do not read Griffith as requiring us to reconsider our earlier holding in Britz.

123 Ill.2d at 129-30.

The reasoning of the Illinois Supreme Court is, however, based on a misunderstanding of Griffith. The rule announced in Griffith applies to all cases pending on direct review at the time it was decided. Petitioner's case was pending on direct review at that time. Therefore, the retroactivity principle of Griffith applies to Petitioner's case. It is irrelevant that the Illinois Supreme Court had applied a different retroactivity analysis to the substantive Zehr issue involved before Griffith was decided.

Because the Illinois Supreme Court refused to give retroactive effect to a constitutional holding (Zehr), in a case pending on direct review at the time Griffith was decided, certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED REGARDLESS OF WHETHER A ZEHR VIOLATION OCCURRED IN THIS CASE.

Lastly, the Respondent argues that certiorari should not be granted because no Zehr violation occurred on the facts of this case. This consideration, however, is irrelevant to whether certiorari should be granted.

The Illinois Supreme Court refused to reach the merits of

the Zehr issue based on its determination that Zehr was not retroactive. That determination was in conflict with Griffith v. Kentucky. This Court should grant certiorari, vacate the judgment of the Illinois Supreme Court, and hold that a state court which renders a decision establishing a new federal constitutional rule is bound to apply this Court's retroactivity standards in determining the scope of retroactivity of that new rule. The case should then be remanded to the Illinois Supreme Court for reconsideration of the Zehr issue in light of Griffith. That is the appropriate, and necessary, relief to which Petitioner is entitled.

CONCLUSION

For the foregoing reasons, Donald R. Lego, Petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

NO. 59908

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD LEGO, Defendant-Appellant.	))))))))	Direct appeal from the Circuit Court of Illinois, 12th Judicial Circuit, No. 83-CF-520 The Honorable Michael A. Orenic, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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ORAL ARGUMENT REQUESTED

the precise form submitted by Lego, the subject matter of Lego's question was covered during the course of voir dire interrogation.

If this court does find that a Zehr violation occurred at bar, the People ask that this court hold that Zehr does not apply retroactively. It has been the policy of this court to give only prospective application to a decision which reverses the prevailing precedent. Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981); Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981); People v. Viser, 62 Ill.2d 568, 343 N.E.2d 903 (1975); People v. Rossi, 52 Ill.2d 13, 284 N.E.2d 275 (1972).

Before Zehr, questions regarding the basic guarantees were explained by the court at voir dire in the manner conducted by Judge Orenic at bar; individual questioning regarding each guarantee was considered inappropriate under Supreme Court Rule 234 as improper questioning on matters of law and instruction. People v. Lobb, 177 Ill.2d 287, 161 N.E.2d 325 (1959); Ill. Rev. Stat., ch. 110A, par. 234 (Smith-Hurd, 1968), Historical and Practice Note, pp. 258-260. Jurors were only to be asked whether or not they are willing and able to accept and follow the instructions concerning the law of the case. Lobb, 17 Ill.2d at 302.

Voir dire at bar occurred in March of 1984 and Zehr came down in September of 1984. Therefore, it should not be applied to this case.

APPENDIX B

NO. 59908

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	No. 83-CF-520
DONALD R. LEGO,	)	Honorable Michael A. Orenic, Judge Presiding.
Defendant-Appellant.	)	

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ORAL ARGUMENT REQUESTED

The State alternatively argues that in the event of a Zehr violation, that decision should be applied retroactively because it is "a decision which reverses the prevailing precedent." (State's Br. 25) However, even a cursory reading of Zehr establishes that that decision has nothing to do with reversing existing precedent. Cf. Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981) (where this Court changed the structure of negligence theory in Illinois, reversing the prevailing contributory negligence standard and replacing it with comparative negligence).

Finally, although the State also alternatively argues that the recent decision in Zehr should be overruled, no sound reason is given for such a result. The proposition is therefore meritless.

> these basic guarantees, an instruction given at the end of trial will have little curative effect. It is also vital to the selection of a fair and impartial jury that a juror who finds that the State has failed to sustain its burden of proof of guilt beyond a reasonable doubt have no prejudice against returning a verdict of not guilty.
>
> 469 N.E.2d at 1064.

Accordingly, since Zehr involves a rule of "constitutional dimension", it must be applied retroactively to all cases pending on direct appeal under this Court's recent decision in Erickson. Erickson applied for the first time the decision of the United States Supreme Court in Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649, 661 (1987). Erickson held that under Griffith a judicial opinion is retroactive to all cases pending on direct review at the time the opinion is announced where (1) the opinion declares a new constitutional rule, or (2) the opinion declares "a newly announced rule of criminal procedure which implicates the fundamental fairness or the truth-seeking effectiveness of a defendant's trial on the issue of guilt or innocence." Erickson, slip op. at 10.

As these principles are applied to the present case, this Court's decision in Zehr at the very least and by definition satisfies the second prong of Erickson. Zehr is predicated on the qualification of jurors who may be so biased or prejudiced against defendant's constitutional guarantees that they would return a verdict of guilty despite the sufficiency of the evidence. One would be hard-pressed to find a more fundamental proposition implicating the fundamental fairness of a criminal trial. Therefore, Zehr should have been applied retroactively to

APPENDIX C

NO. 59908

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit of Will County, Illinois.
Plaintiff-Respondent,	)	
vs.	)	No. 83-CF-520
DONALD R. LEGO,	)	Honorable Michael A. Orenic, Judge Presiding.
Defendant-Petitioner.	)	

PETITION FOR REHEARING

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III.

BECAUSE THIS COURT RECENTLY HELD IN PEOPLE V. ERICKSON, NO. 59058 (4/2/87), THAT NEW RULES OF CONSTITUTIONAL DIMENSION MUST BE APPLIED RETROACTIVELY TO CASES ON DIRECT APPEAL, AND BECAUSE THIS COURT'S DECISION IN PEOPLE V. ZEHR, 103 Ill.2d 472 (1984) CLEARLY IMPLICATES SUCH CONSTITUTIONAL GUARANTEES AS THE RIGHT TO A FAIR AND IMPARTIAL JURY AND THE RIGHT TO THE PRESUMPTION OF INNOCENCE, REHEARING ON ARGUMENT III IS ESSENTIAL.

Because of this Court's recent decision in People v. Erickson, No. 59058, (4/2/87) (Appendix C), this Court should grant rehearing to reconsider its refusal to apply retroactively People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984). People v. Lego, No. 59908, slip op. 5 (4/2/87). Zehr clearly implicates issues of constitutional dimension because it was predicated on two wholly interrelated constitutional concepts:

1. the defendant's constitutional guarantee to the presumption of innocence in a criminal case (In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and

2. the defendant's constitutional guarantee to a fair and impartial jury (Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, 428-429 (1965); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 708-710 (1967).

There is no question that Zehr applied these constitutional guarantees, where this Court held there:

> We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent...If a juror has a prejudice against

defendant's case and should have required that he receive a new and fair trial.

It is self-evident from the above discussion that this Court should re-evaluate its retroactivity analysis of People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) (as applied in People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986)). This Court should therefore grant rehearing on Argument III and order that defendant receive a new trial, or, in the alternative, order full briefing on this essential point.